

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

DIANNE JACOBS, Individually and as)	
Special Administrator for the purposes of)	
this Lawsuit on behalf of Decedent RITA)	
TREUTEL,)	
)	
Plaintiff,)	
)	
v.)	Case No. 12-cv-00899
)	
3M COMPANY, <i>et al.</i> ,)	
)	
Defendants.)	

**OWENS-ILLINOIS, INC.'S
STATEMENT OF PROPOSED FINDINGS OF FACT**

Owens-Illinois, Inc. ("Owens-Illinois") submits the following statement of proposed findings of fact pursuant to this Court's procedure to be followed on motions for summary judgment.

I. Subject Matter Jurisdiction Exists

1. Plaintiff Dianne Jacobs is a resident of Fallon, Nevada, and her deceased mother, Rita Treutel, was a resident of Marshfield, Wisconsin. Pl.'s First Amend. Compl. ¶¶ 1-2, ECF No. 46-1.

2. Owens-Illinois is a Delaware corporation with its headquarters in Ohio. Pl.'s First Amend. Compl. at Ex. A, ECF No. 46-1.

3. The amount in controversy exceeds \$75,000, exclusive of interest and costs. Pl.'s First Amend. Compl. ¶ 13, ECF No. 46-1.

II. Venue Is Proper

4. Rita Treutel was a resident of the Western District of Wisconsin and

alleges asbestos exposure in the Western District of Wisconsin. Pl.'s First Amend. Compl. ¶¶ 2, 15, ECF No. 46-1.

III. There Is No Evidence of Owens-Illinois Kaylo at the Marshfield Door Plant

5. In 1948, Owens-Illinois started commercially manufacturing a fire-resistant hydrous calcium silicate product, commonly called "Kaylo." Sam Schillaci Test. 7-8, 10-11, 46, June 23, 1989.

6. In the early spring of 1953, Owens-Illinois shut down its Sayreville, New Jersey plant where it manufactured Kaylo door cores. Thereafter, Owens-Illinois made limited productions of Kaylo door cores only for existing customers until they could find another material or find someone else that could make door cores. Sam Schillaci Test. 18-19, June 23, 1989.

7. On April 30, 1958, Owens-Illinois then sold the entire Kaylo division to Owens-Corning Fiberglas Corporation ("Owens-Corning Fiberglas"), a separate company that continued to manufacture and sell products under the brand name Kaylo into the 1970s. Brian Watson Decl. at Exs. A, B, March 6, 2015.

8. Before September 17, 1959, there are no invoices reflecting any shipment of Kaylo products to the door plant located in Marshfield, Wisconsin ("Marshfield door plant"). Brian Watson Decl. at Ex. B, at ¶¶1-2, March 6, 2015; Andrew Oh Aff. at OCFB 1, Jan. 30, 2014.

9. Plaintiff's attorneys have nothing, other than a patent license, that shows any connection between Owens-Illinois and the Marshfield door plant:

MR. CASCINO: We have no documents. And if we do, there may be one or two invoices I saw, but I don't even believe, my legal assistant's saying no, shaking his head no is that there are none.

So the only thing we have are, again, is what Riley provided us, which was an affidavit by him saying that they did have a process patent.

THE COURT: Okay. Well we will take that then as your representation with respect to having searched the materials, and you're telling me then you see nothing that shows any specific kind of connection, other than what you said with respect to information you have for Mr. Riley that I presume Mr. Casmere is aware of.

MR. CASCINO: Yes, Your Honor. That's true.

Hr'g Tr. 8:19-9:7, *Seehafer v. Weyerhaeuser Co.*, No. 14-CV-00059 (E.D. Pa. Jan. 13, 2014).

IV. Rita Treutel Was Never Exposed to Owens-Illinois Kaylo.

10. Rita Treutel and her husband, Leroy Treutel, and two of her children, Dianne Jacobs and John Treutel, allegedly worked at the Marshfield door plant. Pl.'s First Amend. Compl. ¶¶ 17-18, ECF No. 46-1.

11. Plaintiff has neither disclosed nor produced any evidence that Rita Treutel, Leroy Treutel, Dianne Jacobs, and John Treutel ever worked with or around Owens-Illinois Kaylo.

12. Plaintiff has neither disclosed nor produced any evidence that anyone ever used Owens-Illinois Kaylo during Rita Treutel, Leroy Treutel, Dianne Jacobs, and John Treutel's employ or in their presence.

V. Other Workers at the Marshfield Door Plant Confirm They Did Not Use Owens-Illinois Kaylo.

13. Ronald Koepke testified that he worked at the Marshfield door plant

between 1957 and 2000, and the only Kaylo door cores used at the Marshfield door plant were manufactured by Owens-Corning Fiberglas and Weyerhaeuser. Workers at the Marshfield door plant also referred to door cores generically as Kaylo. Ronald Koepke Dep. 227, 234-46, Feb. 18, 2014.

14. Wesley Sydow testified that he worked at the Marshfield door plant between 1947 and 1951, 1952 and 1961, and 1962 and 1990, and that Owens-Corning Fiberglas was the only manufacturer of Kaylo door cores used at the Marshfield door plant. Wesley Sydow did not see any manufacturer of door cores other than Owens-Corning Kaylo and Weyerhaeuser. Wesley Sydow Dep. 23, 29, 32-33, 39, 60, 74, Nov. 12, 2014.

15. Roger Seehafer testified that, in 1964, he saw fire doors for the first time at the Marshfield door plant and Kaylo for the first time at the Marshfield door plant. According to Roger Seehafer, Weyerhaeuser mixed and made its own Kaylo door cores in its own Kaylo department, which was located in a separate building at the Marshfield door plant. Roger Seehafer Dep. 115, 126-27, 162, 206-07, Jan. 22, 2014.

16. Jerry Saindon testified that he does not know whether Roddis ever used Kaylo door cores (before Weyerhaeuser took over the Marshfield door plant in 1960); he does not know when the Marshfield door plant started using Kaylo door cores; he does not know where Kaylo door cores came from; and Owens-Corning Fiberglas was the manufacturer of Kaylo door cores. Jerry Saindon Dep. 60-61, 86, Mar. 12, 2014.

17. Wilhelm Haeni could not testify that Roddis ever used Kaylo door cores at the Marshfield door plant. At some point after Weyerhaeuser bought the Marshfield

door plant in 1960, Wilhelm Haeni remembers that Kaylo door cores were used at the Marshfield door plant. Wilhelm Haeni Dep. 38-39, Mar. 11, 2014.

18. Verna Fohrman testified that she did not work with Kaylo door cores at all from 1946 until 1963, and that Kaylo door cores were made by Roddis and Weyerhaeuser. Verna Fohrman Dep. 36-37, June 15, 2011.

19. Siegfried Sebastian testified that Kaylo door cores were made by Roddis and Weyerhaeuser, and that Roddis and Weyerhaeuser never purchased Kaylo door cores from anyplace else. Siegfried Sebastian Dep. 86-87, June 15, 2011.

20. Charles Reno testified that he worked at the Marshfield door plant beginning in 1959; the earliest he ever saw Kaylo door cores at the Marshfield door plant was in 1959; and Owens-Corning Fiberglas was the only manufacturer of Kaylo door cores. Charles Reno Dep. 6, 8, 32, 42-45, 48, June 15, 2011; Dep. Charles Reno 139, 288, 336, 339, Apr. 23, 2014.

21. Steven Delis testified that Kaylo door cores were made at the Marshfield door plant by Weyerhaeuser and that workers at the Marshfield door plant referred to door cores generically as Kaylo. Steven Delis Dep. 53-55, Feb. 19, 2014.

22. James Genett testified that Kaylo door cores were made at the Marshfield door plant by Weyerhaeuser and that workers at the Marshfield door plant referred to door cores generically as Kaylo. James Genett Dep. 50, 51, Feb. 19, 2014.

VI. The Marshfield Door Plant Used Other Door Cores (Not Owens-Illinois Kaylo)

23. Roddis manufactured a "Golden Dowel" ¾-hour fire door using a wood particle core. Brian Watson Decl. at Ex. C, March 6, 2015.

24. In July 1948, Reynolds & Co., a New York brokerage firm, recommended that Roddis make a deal with glass companies, other than Owens-Illinois, like Corning or Libby-Owens-Ford, to develop a competitive product to Owens-Illinois Kaylo and not to sell fire doors with the same Kaylo door core as Roddis' primary competitor, U.S. Plywood. Brian Watson Decl. at Ex. D, March 6, 2015.

25. In August 1948, Roddis met with the Armour Research Foundation, an industrial research laboratory in Chicago, about creating their own door cores that would be comparable to Owens-Illinois Kaylo. Brian Watson Decl. at Ex. E, March 6, 2015.

26. In January 1949, Roddis hired the Armour Research Foundation to develop their own door cores that would be comparable to Owens-Illinois Kaylo. Brian Watson Decl. at Ex. E, March 6, 2015.

27. In February 1949, Roddis had tests performed on the door cores from the Armour Research Foundation as compared to Owens-Illinois Kaylo. The door cores from the Armour Research Foundation failed the tests. Brian Watson Decl. at Ex. F, March 6, 2015.

28. In November 1950, Roddis developed and submitted a Protex #60 fire door for a "B" level rating from Underwriters Laboratories ("UL"). The Protex #60 fire door burned for one hour, but it could not withstand UL's fire hose test. Brian Watson Decl. at Ex. G, March 6, 2015.

29. In November 1952, Roddis had tests performed on its hollow core door, one-panel door, solid core door, and Protex #60 fire door under the Improved Risk

Mutual's Fire Test. Brian Watson Decl. at Ex. H, March 6, 2015.

30. In 1953, Roddis developed a fire door with Johns-Manville Asbestocore. Brian Watson Decl. at Exs. I & J, March 6, 2015.

31. In April 1954, UL tested the fire doors manufactured by Roddis with Johns Manville Asbestocore. Brian Watson Decl. at Ex. K, March 6, 2015; June Thomas Aff. at UL000001-UL000025, Jan. 24, 2014.

32. In May 1954, UL approved the fire doors manufactured by Roddis with Johns Manville Asbestocore. Brian Watson Decl. at Ex. L, March 6, 2015; June Thomas Aff. at UL000001-UL000025, Jan. 24, 2014.

33. In September 1954, Roddis began production of the fire doors with Johns Manville Asbestocore. Brian Watson Decl. at Ex. M, March 6, 2015.

34. Based on their UL certification, Roddis and Weyerhaeuser had to follow a specific manufacturing process and use specific materials:

Q So when Roddis or Weyerhaeuser had a UL certification and it set forth the manufacturing and the materials that were used in that door to achieve that UL certification, Roddis and Weyerhaeuser would follow that UL certification?

A **They had to.**

Ronald Koepke Dep. 239:20-25, Feb. 18, 2014.

35. In August 1955, Roddis filed a patent application and later obtained U.S. Patent No. 2,797,450, which described its fire doors with Johns Manville Asbestocore. Brian Watson Decl. at Ex. N, March 6, 2015.

36. In August 1955, Roddis later considered withdrawing its fire doors from

the market until they were on par with the fire doors manufactured and sold by its primary competitor, U.S. Plywood. Brian Watson Decl. at Ex. P, March 6, 2015.

37. In February 1956, Roddis wrote to Owens-Illinois that Roddis was unable to buy Owens-Illinois Kaylo and that Roddis was manufacturing fire doors with Johns Manville asbestos cores:

When you were engaged in the manufacture of Kaylo for U.S. Plywood we tried on a number of occasions to buy this product from you without much success. Later we had some correspondence with and you advised you had decided to go out of this business. Accordingly, we turned to the manufacture of a fireproof door with an asbestos core made by Johns-Manville and have made a few thousand of these doors, which, however, we must say, have not been altogether satisfactory.

....

We should also appreciate hearing from you as to whether you expect to resume the manufacture of Kaylo.

Brian Watson Decl. at Ex. Q, March 6, 2015.

38. In February 1956, Owens-Illinois responded to Roddis' request for a nonexclusive license to U.S. Patent No. 2,593,050 and made clear that Roddis "may acquire such license regardless of whether you purchase core material from our Kaylo Division." Brian Watson Decl. at Ex. R, March 6, 2015.

39. In March 1956, Roddis acquired a nonexclusive license from Owens-Illinois of U.S. Patent No. 2,593,050. Brian Watson Decl. at Ex. S, March 6, 2015.

40. On April 30, 1958, Owens-Illinois ceased the manufacture and sale of Kaylo and sold the entire Kaylo division to Owens-Corning Fiberglas. Brian Watson Decl. at Ex. A, March 6, 2015.

41. In August 1959, the Board of Directors of Roddis approved the purchase

of certain timberlands and plants of Owens-Illinois Plywood Company, Inc., which was a separate and distinct corporate entity from Owens-Illinois, and noted that Owens-Illinois Plywood Company, Inc. “has a successful mineral core door with a Kaylo core which is superior to our [Roddis’] mineral core door.” Brian Watson Decl. at Ex. T, March 6, 2015.

42. On September 1, 1959, Roddis acquired certain timberlands and plants of Owens-Illinois Plywood Company, Inc., which was a separate and distinct corporate entity from Owens-Illinois. Brian Watson Decl. at Ex. U, March 6, 2015.

43. On September 17, 1959, Roddis placed a “special order” with Owens-Corning Fiberglas for ten packages of Kaylo door cores shipped to “Roddis Plywood Corp. Experimental” at the Marshfield door plant. Andrew Oh Aff. at OCFB 1, Jan. 30, 2014; Brian Watson Decl. at Ex. B, March 6, 2015.

44. Before September 17, 1959, there are no invoices reflecting any sale of Kaylo products to the Marshfield door plant. Andrew Oh Aff. at OCFB 1, Jan. 30, 2014; Brian Watson Decl. at Ex. B, March 6, 2015.

45. In June 1960, Owens-Illinois Plywood Company, Inc., which was a separate and distinct corporate entity from Owens-Illinois, was terminated and dissolved as a corporate entity under Vermont law. Brian Watson Decl. at Ex. V, March 6, 2015.

46. In August 1960, Weyerhaeuser purchased the assets of Roddis, including the Marshfield door plant. Brian Watson Decl. at Ex. W, March 6, 2015.

47. By 1960, the Marshfield door plant had several buildings on its site,

including a general office, veneer and plywood plant, door factory, sawmill, log yard, and others:



Weyerhaeuser Company, *Annual Report* at 10, 16 (1960), available at

[https://content.lib.washington.edu/cgi-](https://content.lib.washington.edu/cgi-bin/showfile.exe?CISOROOT=/reports&CISOPTR=2550&CISOMODE=print)

[bin/showfile.exe?CISOROOT=/reports&CISOPTR=2550&CISOMODE=print.](https://content.lib.washington.edu/cgi-bin/showfile.exe?CISOROOT=/reports&CISOPTR=2550&CISOMODE=print)

48. Throughout the 1950s and 1960s, Roddis and Weyerhaeuser had a UL approval for fire doors with Johns-Manville Asbestocore. Brian Watson Decl. Ex. X, March 6, 2015; June Thomas Aff. at UL000008, Jan. 24, 2014.

49. Between December 1960 and November 1972, Owens-Corning Fiberglas shipped more than 15,000 pallets, with more than 1 million pieces, of Owens-Corning Fiberglas Kaylo door cores to the Marshfield door plant. Brian Watson Decl. at Ex. B, March 6, 2015; Andrew Oh Aff. at OCFB 1-OCFB 771, Jan. 30, 2014.

50. In March 1961, Weyerhaeuser had a UL approval for fire doors with Owens-Corning Fiberglas Kaylo door cores. Brian Watson Decl. at Ex. Y, March 6, 2015.

51. In 1966 and 1967, Weyerhaeuser developed its own asbestos-containing door cores. Joseph Wendlick Dep. 329:5-12, Mar. 19, 2014.

52. In 1966 and 1967, Weyerhaeuser had issues with Owens-Corning Fiberglas as the sole supplier of door cores:

Q. In fact, Weyerhaeuser was buying core material at that time from only one supplier?

A. **Single source, yes.**

Q. Who was the supplier of the core material?

A. **Owens-Corning Fiberglas[].**

Q. So given the price pressures, the single supplier problem, and likely some other problems, Weyerhaeuser decided to develop a mineral core of its own for its fire doors?

A. **Correct.**

Joseph Wendlick Dep. 328:16-329:1, Mar. 19, 2014.

53. In 1966 and 1967, Weyerhaeuser wanted a stronger, single door core that could be manufactured into the fire doors, rather than multiple door cores with a tongue and groove design inside the fire doors. Joseph Wendlick Dep. 332:21-333:24, Mar. 19, 2014.

54. Weyerhaeuser chemically analyzed Owens-Corning Fiberglas Kaylo K17, and other asbestos-containing materials, to develop its own asbestos-containing core material. Joseph Wendlick Dep. 330:15-332:20, Mar. 19, 2014.

55. In 1968, Weyerhaeuser opened a mineral core plant and began to

manufacture its own asbestos-containing door cores at the Marshfield door plant.

Ronald Koepke Dep. 19:19-21:11, Feb. 18, 2014.

56. In order to manufacture asbestos-containing door cores at the Marshfield door plant, Weyerhaeuser bought tons of raw asbestos fibers from at least five sellers: Johns-Manville, Owens-Corning Fiberglas, North American Asbestos, Carey of Canada, and the United States Government. Ronald Koepke Dep. 59-60, 65, May 1, 2007; Ronald Koepke Dep. 243, Feb. 18, 2014; Margaret J. Baumgardner Aff., Sept. 18, 2013; Brian Watson Decl. Ex. B, March 6, 2015

57. In June 1978, Weyerhaeuser ceased the use of asbestos in its door cores and fire doors at the Marshfield door plant. Ronald Koepke Dep. 253:20, Feb. 18, 2014.

VII. There Was No Foreseeable Risk of Harm from Household or Community Asbestos Exposure When Owens-Illinois Manufactured and Sold Kaylo.

58. There was no scientific or medical literature at all focusing on disease resulting from household or community exposure to asbestos before 1960. Peter Neushul, Ph.D. Decl. ¶¶ 1-10, Sept. 26, 2014.

59. There was no evidence of risk from household or community exposure to asbestos before 1960. Peter Neushul, Ph.D. Decl. ¶¶ 1-10, Sept. 26, 2014.

60. When Owens-Illinois ceased manufacturing and selling its Kaylo product in April 1958, there was no scientific or medical knowledge that even suggested, much less established, a relationship between household exposure and a risk of developing asbestos-related disease. Peter Neushul, Ph.D. Decl. ¶¶ 1-10, Sept. 26, 2014.

61. Dr. Henry Anderson, a medical expert who regularly testifies for

Plaintiffs' attorneys, admits that there were no studies at all indicating there was any risk of asbestos-related disease among household members of workers. Henry Anderson Hr'g Test. 178:15-23, Jan. 14, 2013.

62. Dr. Barry Castleman, a purported state-of-the-art expert who regularly testifies for Plaintiffs' attorneys, admits that the first published study or article regarding the association between household or take-home exposure to asbestos and asbestos-related disease was in 1960. Barry Castleman Dep. 61:9-16, Oct. 6, 2008.

63. Frank Parker, an industrial hygiene expert who regularly testifies for Plaintiffs' attorneys, admits that the first study showing that people could get disease from exposure to asbestos in the home (a landmark study) was in the 1960 by Dr. Wagner, and the first study showing that people could get asbestos-related disease from asbestos on clothing that was brought home was in 1965 by Dr. Newhouse. Frank Parker Tr. Test. 77:29-79:2, Oct. 15, 2013.

64. Dr. Arthur Frank, a medical expert who regularly testifies for Plaintiffs' attorneys, admits that the first epidemiological study showing any link between household exposure to asbestos and asbestos-related disease was in 1965 by Dr. Newhouse. Arthur Frank Dep. 86:9-15, 87:16-24, Aug. 7, 2014.

65. Steven Paskal, an industrial hygiene expert who regularly testifies for Plaintiffs' attorneys, admits there was no report of mesothelioma from household exposure to asbestos before 1965. Steven Paskal Dep. 96:16-96:19, Nov. 16, 2010.

66. Dr. Victor Roggli, a medical expert who has authored numerous texts and articles on the pathology of asbestos-related diseases and who regularly testifies at the

request of both plaintiffs' and defendants' attorneys, admits the first article about mesothelioma from household asbestos exposure was in 1965. Victor Roggli Dep. 71:6-71:20, Aug. 31, 2005.

VIII. Roddis and Weyerhaeuser Knew of the Dangers of Excessive Asbestos Exposure.

67. In 1947, Wisconsin established laws that applied to all manufactures, limiting the maximum amount of asbestos dust permissible in manufacturing facilities. Brian Watson Decl. at Ex. Z, March 6, 2015.

68. The laws identified asbestos exposure as "harmful" when asbestos dust exceeded 5 million particles per cubic foot (mppcf) of air. *Id.* at "Mineral Dusts," 1, 4.

69. According to the laws, asbestos exposure below 5 mppcf would "not be sufficient to cause discomfort or to incapacitate the workman during his normal lifetime." *Id.* at 8. The best available scientific knowledge at the time supported the claim that exposure to asbestos dust below 5 mppcf was not harmful. *Id.* at 7.

70. The laws required Wisconsin employers—including Roddis and Weyerhaeuser—to take measures to prevent "harmful levels of exposure." *Id.* at 13. The measures required employers to install exhaust systems on dust generating equipment, install ventilation systems to remove dust from plants, and provide dust masks and respirators to workers. *Id.* at 14-17. Each day of non-compliance subjected the employer to a civil penalty. *Id.* at 8-9.

71. William Lea, who worked at the Wisconsin Board of Health, testified that they travelled at the request of various industry and union representatives from Wisconsin companies to measure dust levels under the laws and prevent harmful levels

of asbestos exposure. William Lea Dep. 14-21, Oct. 16, 1985.

72. Dr. Henry Anderson, a medical expert who regularly testifies for Plaintiffs' attorneys, admits that all Wisconsin employers knew in 1947 "that asbestos was a hazardous material and that there were mppcf." Henry Anderson Dep. 229:20-22, Apr. 30, 2010.

Dated: May 14, 2015

Respectfully submitted,

By: /s/Brian O. Watson

Edward Casmere
Brian O. Watson
Rachel A. Remke
Schiff Hardin LLP
233 S. Wacker Dr. Suite 6600
Chicago, Illinois 60606
(312) 258-5500
(312) 258-5600 (facsimile)
Attorneys for Defendant
Owens-Illinois, Inc.

CERTIFICATE OF SERVICE

I certify that on May 14, 2015, these papers were filed with the Clerk of the Court for the United States District Court for the Western District of Wisconsin using the CM/ECF system, which will send notification of such filing upon all parties who have appeared.

/s/ Brian O. Watson
Brian O. Watson

15640-1246

CH2\16260433.2